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Workmen's Compensation

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WORKMEN'S COMPENSATION

I. Notice Of The Accident

Failure to give an employer written notice of an injury within the 30-day statutory period[1] occurred in *Sanders v. Richardson.*[2] The claimant brought an action against his employer for injuries sustained in the course of employment, asserting that he was injured while lifting a heavy bag of mortar mix on a Monday. He missed work on Tuesday, then worked Wednesday, Thursday, and Friday. Not until Friday did he mention his malady to his employer, and even then he described it only as "a kind of hurting in my side and in my back . . ." which he attributed to hemorrhoids. Thus the claimant failed to tell his employer how, when, or where he sustained the injury. The circuit court affirmed the Industrial Commission's award to the claimant by deciding that the employer had notice of claimant's injury even though written notice had not been given within thirty days.

The South Carolina Supreme Court reversed, since no evidence supported the finding that Sander's employer had actual notice of the accident. The employer knew that his employee was having some sort of physical difficulty, but that was insufficent to support a claim that the employer, within thirty days after occurrence of the accident, had knowledge of the lifting incident in which the claimant hurt his back.[3]

Failure to give written notice within the statutory period reappeared in *Dawkins v. Capitol Construction Co.*[4] In this case, however, the opposite conclusion was reached. The claimant, Colie Dawkins, injured his ankle while working for the defendant. Immediately Dawkins orally informed his employer of the nature, place, and time of the injury, but neither the claimant nor his employer sought medical attention for the wounded ankle.

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1. S.C. Code Ann. § 72-301 (1962) provides in part:
   Every injured employee . . . shall . . . give . . . a written notice of the accident . . . [b]ut no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident . . . unless reasonable excuse is made to the satisfaction of the Commission . . . and the Commission is satisfied that the employer has not been prejudiced thereby.
2. 251 S.C. 325, 162 S.E.2d 257 (1968).
3. *Accord,* Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952).
4. 167 S.E.2d 439 (S.C. 1969).

Despite the requirement of Section 72-301,[5] written notice of the accident was not given to the employer until disability resulted five months after the accident. In the initial action, compensation had been awarded the claimant by the commission, affirmed by circuit court, and appealed by the employer. The supreme court had ruled that the accident was the proximate cause of claimant's disability but remanded the case to the Industrial Commission to find whether the failure to file written notice within thirty days was reasonably excusable and whether prejudice resulted to the defendant from such failure.[6]

After hearing voluminous testimony, the commission found that:

> The Defendants cannot and have not shown any prejudice by failure of Claimant to furnish a written report within the thirty day period. The [employer] admitted having knowledge of the accident shortly after it happened . . .; that said knowledge, being as full of the pertinent facts as would have been disclosed by a written notice, is reasonable excuse to the satisfaction of this Commission for the failure of the employee to give written notice and the employer has not been prejudiced thereby.[7]

The award to claimant at this second hearing was affirmed by the circuit court, and the employer again appealed.

Appellant contended, upon two exceptions, that there was no evidence to support findings of either reasonable excuse or lack of prejudice.[8] With respect to reasonable excuse, the supreme court noted that even the employer testified to having actual knowledge within moments after the accident of every pertinent fact which written notice would have been required to disclose.[9]

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5. S.C. CODE ANN. (1962), set out at note 1, *supra*. The 30-day period begins to run on the occurrence of the accident, not the onset of the disability.
6. Dawkins v. Capitol Const. Co., 250 S.C. 406, 158 S.E.2d 651 (1967). *See also Workmen's Compensation, 1968 Survey of South Carolina Law*, 20 S.C.L. REV. 678, 679-80 (1968).
7. Record at 87.
8. Brief for Appellant at 7-12.
9. On cross-examination the employer testified as follows:
   Q. Mr. Medlin, there's no doubt about it, that . . . very shortly after Colie got hurt, you knew that he had had something happen to his foot?
   A. Yes sir.
   Q. It was merely the extent as to what the injury was that you didn't realize?
   A. That's right.

Therefore, the commission's conclusion that there was a reasonable excuse for the claimant's failure to give written notice within thirty days was amply supported by the evidence.

With reference to prejudice, the court declared South Carolina law settled that the burden of proving prejudice is upon the employer.[10] Moreover, the decisions of the supreme court show that an employer cannot claim prejudice where its knowledge of the pertinent facts was as full as that it would have gained by a written notice.[11] Consequently the employer failed to prove prejudice, and claimant's award was affirmed.

An examination of *Sanders* and *Dawkins* reveals that failure to comply with the statutory written notice requirement does not bar the possibility of compensation so long as the employer learns as much about the nature, place, and time of the injury as a written report would have disclosed.

II. POST-INJURY EARNINGS

One of the most interesting workmen's compensation issues during the survey period caused a division in the South Carolina Supreme Court. In *Owens v. Herndon*[12] the claimant, after sustaining a compensable back injury, returned to his job at the same rate of pay as before the accident. During the next two years he changed jobs twice, one time by concealing his injury. Although his hourly pay increased by more than a dollar during that time, he lost an average of three days per month because of his back injury. The pain caused him by continuing to work might ordinarily have prevented him from working altogether were it not for his wife's poor health. His fellow employees covered for him when he was unable to lift or do heavy work.

The hearing commission found a thirty per cent permanent physical impairment and ordered the defendant to pay accordingly. On appeal by the employer, the full commission agreed

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Q. And you also knew that he did get hurt there on the dragline?

A. Yes sir. The connection between the leads.

Record at 47-48.

10. S.C. CODE ANN. § 72-302 (1962). *See also* Strawhorn v. J.A. Chapman Const. Co., 202 S.C. 43, 24 S.E.2d 116 (1943).

11. *See, e.g.*, Mize v. Sangamo Elec. Co., 251 S.C. 250, 161 S.E.2d 846 (1968); Ricker v. Villager Management Corp., 231 S.C. 47, 97 S.E.2d 83 (1957); Raley v. City of Camden, 222 S.C. 303, 72 S.E.2d 572 (1952); Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952); Strawhorn v. J.A. Chapman Const. Co., 202 S.C. 43, 24 S.E.2d 116 (1943).

12. 165 S.E.2d 696 (S.C. 1969).

that Owens had sustained such an impairment, but found no disability within the meaning of the Workmen's Compensation Act in that he had suffered no diminution in wages.[13] The circuit court reversed, reinstating the award of the hearing commissioner.

The South Carolina Supreme Court, two justices dissenting, reversed the circuit court order and restored the Industrial Commission's decision denying compensation. The majority cited Section 72-10 of the South Carolina Code which defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The majority asserted that disability is to be measured solely by the employee's capacity to earn the wages he was receiving at the time of his injury. There is no recognition of pain and suffering, or of increased discomfort and difficulty in working.[14] Since the claimant's post-injury wages actually increased, he had suffered no disability under the Act and hence was ineligible for compensation.

The two dissenters, Justices Bussey and Lewis, contended that the case should be remanded to the Industrial Commission for further findings. They found the case to be factually distinguishable from prior decisions[15] wherein compensation was denied on the basis of post-injury earnings, and thought the question presented to be of novel impression. The dissenting justices felt that the court's holding made post-injury earnings which happened to exceed those before the injury legally conclusive against a finding of impaired earning capacity.

Justice Bussey distinguished earlier South Carolina cases in which a claimant who earned as much or more after the accident was denied compensation by noting that in none of them had an actual diminution in earning *capacity* been shown. Far from requiring the majority's result, prior workmen's compensation deci-

13. S.C. CODE ANN. § 72-152 (1962) provides in part:
> [W]hen the incapacity for work resulting from the injury is partial, the employer shall pay . . . to the injured employee during such disability a weekly compensation equal to sixty per cent of the *difference* between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than thirty-five dollars a week.

(Emphasis added.)
14. S.C. CODE ANN. § 72-152 (1962).
15. Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967); Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954); Parrott v. Barfield Used Parts, 206 S.C. 381, 34 S.E.2d 802 (1945).

sions uniformly recognized *capacity* to earn as the criterion for assessing disability. Finding no South Carolina case putting this principle to the acid test posed by a finding of higher post-accident earnings, Justice Bussey examined the law in other jurisdictions. He found it to be "uniformly held . . . that a finding of disability may stand even where there is evidence of actual post-injury earnings equaling or exceeding those received before the accident."[16] Thus the Industrial Commission could consider — indeed *should* consider — all the facts pertaining to the claimant's earning capacity, not merely wages made between accident and hearing. The dissenters thought it clear that Owens "suffered an actual loss of earning capacity in that he is earning less money than he would be earning were it not for his injury."[17]

As the authorities[18] cited by the dissenters show, the court seems to have construed Section 72-10 so as to require a result which seems practically unknown outside South Carolina: increased post-injury earnings preclude a finding of impaired earning capacity.

III. ARISING OUT OF EMPLOYMENT

The question of whether any competent evidence supported the Industrial Commission's finding that the deceased's fatal heart attack arose "out of and in the course of [his] employment"[19] was the sole issue in *McWhorter v. South Carolina Department of Insurance.*[20] In that case the deceased, Harold McWhorter, was employed by the defendant in a largely sedentary job as an investigator. Before his death McWhorter was required to investigate an involved case requiring him to interview and confer with a large number of witnesses from all over the state. In conducting these interviews the decedent traveled more than fifteen hundred miles and worked more than one hundred twenty-one hours during a ten-day period preceding trial. During that time he was operating under extreme pressure, emotional strain and worry.[21] On Saturday and Sunday before the trial, normally

16. 165 S.E.2d at 701, *quoting* 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 57.21 (1968). To the same effect is 11 W. SCHNEIDER, WORKMEN'S COMPENSATION § 2305 (1957). *See also* Annot., 149 A.L.R. 413, 415 (1944).
17. 165 S.E.2d at 701.
18. *See* note 16 *supra.*
19. S.C. CODE ANN. § 72-14 (1962) provides in part: "Injury shall mean only injury by accident arising out of and in the course of the employment . . . ."
20. 165 S.E.2d 365 (S.C. 1969).
21. Record at 59.

days off, the deceased worked eleven and twelve hours respectively.[22] On the day of the trial, he arose at 3:30 a.m. to drive to Columbia to Greenville for the trial. When the court recessed for lunch, McWhorter, who had no previous history of a heart condition, suffered a fatal heart attack. The defendant appealed from an award of the South Carolina Industrial Commission, affirmed by the circuit court, in favor of the deceased's wife.

On appeal the employer relied heavily on the case of *Pellum v. W.C. Chaplin Transport.*[23] In that case the deceased, who had been employed as a truck driver, also suffered a heart attack allegedly from overexertion. The South Carolina Supreme Court in denying the claimant a compensation award stated: "It is *usual* for the driver of a petroleum truck to have additional work during cold weather and less work in other seasons, and this is to be expected."[24] The appellant, attempting to analogize *Pellum* to the instant case, contended that it was usual for an investigator to work more on some cases than on others, that the investigation of this particular case was a condition of his employment, and that long hours as such could not be "twisted into an accident."[25]

In a *per curiam* decision, the Supreme Court of South Carolina affirmed the circuit court order granting the claimant benefits under the Workmen's Compensation Act. The court felt that the case at bar came squarely within the doctrine laid down in several prior cases[26] that:

> "the right to compensation is not affected by the fact that the unusual or excessive strain which precipitates the heart attack occurs while the employee is performing work of the same general type as that in which he is regularly involved," and that, "the phrase 'unusual or excessive strain' used in many of the cases, is not so limited in its meaning as to include only work of an entirely different character than that customarily done."[27]

Unusually long hours, great mental stress, emotional involve-

22. *Id.* at 60-62.
23. 249 S.C. 384, 154 S.E.2d 432 (1967).
24. *Id.* at 351, 154 S.E.2d at 433 (emphasis added).
25. Brief for Appellant at 7.
26. Walsh v. United States Rubber Co., 238 S.C. 411, 120 S.E.2d 685 (1961); Kearse v. South Carolina Wildlife Resources Dep't, 236 S.C. 540, 115 S.E.2d 183 (1960); Wynn v. Peoples Natural Gas of S.C., 238 S.C. 1, 118 S.E.2d 812 (1961).
27. 165 S.E.2d at 368, *quoting* Walsh v. United States Rubber Co., 238 S.C. 411, 417-18, 120 S.E.2d 685, 689 (1961).

ment, lack of sleep, time pressure, physical exertion, and other extraordinary work conditions convinced the court that the Industrial Commission's finding of an accident arising from employment was supported by competent evidence.

IV. ADDITIONAL MEDICAL TREATMENT

In *Williams v. Boyle Construction Co.*[28] the claimant's compensable injury produced a paraplegic condition which the Industrial Commission found resulted in total and permanent disability. The employer accepted liability for medical expenses incurred during the first ten weeks after the injury but denied liability thereafter.[29] When the commission awarded medical expenses beyond the ten-week period referred to in the statute, the employer successfully appealed to the circuit court.

In reversing the circuit court and reinstating claimant's award for continuing medical treatment, the South Carolina Supreme Court referred to the controlling provision of Section 72-305: the employer is not liable for medical care beyond ten weeks unless it "will tend to lessen the period of disability . . . ."[30]

The court then noted that the finding of fact by the Industrial Commission that the medical treatment in question would tend to lessen the period of disability is binding if there is any competent evidence reasonably tending to support it. The court's inquiry was therefore limited to whether such competent evidence existed.

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28. 166 S.E.2d 550 (S.C. 1969).
29. S.C. CODE ANN. § 72-305 (1962) provides in part:
> The refusal of an employee to accept any medical . . . treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation until such refusal ceases and no compensation shall . . . be paid for the period of suspension unless in the opinion of the Commission the circumstance justified the refusal . . . .

30. The statute goes on to say that "[i]n case of a controversy arising between employer and employee, the Commission may order such further medical . . . treatment as may in the discretion of the Commission be necessary." S.C. CODE ANN. § 72-305 (1962). Without much elaboration the court chose to limit the discretion thus vested to cases in which care beyond ten weeks would likewise "tend to limit the period of disability." The holding that the clause quoted above adds nothing to the commission's power is probably more significant than the actual disposition made in the instant case. In contrast to its approach in *Owens,* discussed *supra,* in which the court ignored authority from other jurisdictions supporting a liberal interpretation of § 72-10, the court in *Williams* sought cases from other states to buttress its narrow reading of § 72-305: Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939); Trudeau v. United States Rubber Co., 92 R.I. 324, 168 A.2d 459 (1961).

After carefully examining the record the court concluded that the claimant had responded favorably to the treatment thus far afforded him and that evidence that further medical treatment might well restore him to a state of self-sufficiency supported the finding of the Industrial Commission. Thus the commission's award was sustained.

V. REFUSAL OF MEDICAL AID

In *Ford v. Allied Chemical Corp.*[31] the claimant, Andrew F. Ford, sustained an injury to his head and neck while working for the defendant. The company's physician, a general practitioner, enlisted the aid of an orthopedic surgeon in treating Ford. After a few days' hospitalization, the two advised him to return to work. When Ford came back to the orthopedist four days later complaining of neck pains and severe headaches, he was told to take some aspirin and go back to work. Another routine appointment was set up to see both physicians the following week, but claimant's worsening condition prompted him to consult another orthopedist on his own intiative the next day. This orthopedist concluded that Ford was definitely disabled and required prolonged treatment. Ford therefore placed himself under this physician's care and did not keep the routine appointments with either of the company's doctors. Claimant was not declared ready to return to work for ten more weeks.

A compensation award by the Industrial Commission for temporary total disability was affirmed by the circuit court. On appeal the employer argued that the claimant had refused to accept the medical treatment offered, thereby losing his right to compensation.[32]

Responding to this contention, the supreme court noted that the company's general practitioner admittedly had done all he thought he could for the claimant,[33] and the only treatment that Ford refused from the company's orthopedic surgeon was the offer of another routine appointment. The company did not contradict the evidence that claimant was in real need of effective medical treatment. The court concluded that the commission's

31. 167 S.E.2d 564 (S.C. 1969).
32. Brief for Appellant at 8-12. S.C. CODE ANN. § 72-305 (1962) provides in part: "The refusal of an employee to accept any . . . treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation . . . unless in the opinion of the Commission the circumstances justified the refusal . . . ."
33. Record at 33-34.

finding that claimant either did not refuse medical treatment offered by his employer or was justified in doing so was adquately supported by the evidence. Accordingly, the claimant's award was affirmed.

VI. CONSEQUENCES OF THE INJURY

In *Turner v. Campbell Soup Co.*[34] the supreme court directed the Industrial Commission on remand to find whether the *effects* of the employee's injury were connected with the employment. The claimant had sustained a concussion when she fell and struck her head at work. The Industrial Commission found that her employment did not *cause* the fall and denied compensation. The circuit court reversed and remanded the case to the commission only to determine the proper compensation due the claimant. The circuit court's decision was predicated on the principle enunciated in *Bagwell v. Ernest Burwell, Inc.*:[35]

> It must be conceded that the deceased's fall occurred in the course of his employment but this alone furnishes no basis for an award. It must be further shown either that the cause of the fall *or of the resulting injury* bore some special relation to his work or to the conditions under which it was performed.
>
> . . . .
>
> Our conclusion that claimant has failed to show any causal connection between the fall of deceased and his employment does not . . . end our inquiry. There remains for determination whether the fall bore with it such consequences as would not have occurred except for the employment.[36]

Accordingly the supreme court observed that even though the Industrial Commission found that the fall was unrelated to claimant's employment, the inquiry did not end at that point. The commission should have further discovered whether the *consequences* of the fall would not have occurred but for the employment. The supreme court emphasized that the circuit court correctly remanded the case to the commission but erred in concluding "as a matter of fact and law" that the employment was related to the consequences of the fall. Hence, the court called for additional testimony bearing on any causal connection between the consequences of the fall and the employment of the claimant.

34. 166 S.E.2d 817 (S.C. 1969).
35. 227 S.C. 444, 88 S.E.2d 611 (1955).
36. *Id.* at 46-48, 88 S.E.2d at 613-15 (emphasis added).

VII. LEGISLATION

The sections[37] of the South Carolina Code which establish the legal rights of an injured employee, his employer (and the employer's insurer), and a third party tort-feasor have been replaced.[38] Although the new act is too complex for examination in this survey, it may be noted that it provides much more detailed rules governing the situation described than did the old code sections.

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37. S.C. CODE ANN. §§ 72-123 to -126 (1962).
38. R506, July 1, 1969.